No. 93-1882

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NORMAN W. SWANSON, *et al.*,
Petitioners,
v.
THE STATE OF NORTH CAROLINA, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, THE MILITARY COALITION AND DESIGNATED FEDERAL RETIREES IN KANSAS, NEW YORK, ARIZONA, VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONER

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IN THE

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THE STATE OF NORTH CAROLINA, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Association of Retired Federal Employees ("NARFE"), the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin move for leave to file a brief *amici curiae* in support of petitioner. Counsel for respondent refused to consent to the filing of this brief.

NARFE is a nonprofit incorporated association having its principal place of business in Washington, D.C. From its original fourteen charter members, NARFE has grown to a membership of approximately a half a million federal annuitants (retirees and survivors) living throughout the Nation and in various foreign countries. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and it has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades.

While NARFE principally focuses on legislative and administrative issues affecting federal retirees, on a hand-

ful of occasions, either directly or as *amicus,* NARFE has been involved in litigation in this Court. Most recently, NARFE has been involved in the litigation emanating from the states' discriminatory taxation of federal retirement benefits. Because this discriminatory taxation practice was widespread, NARFE participated as *amicus* in *Davis v. Michigan Department of Treasury,* 489 U.S. 803 (1989). Similarly, NARFE members brought the case of *Harper v. Virginia Department of Taxation,* 113 S. Ct. 2510 (1993), which challenged states' reliance on nonretroactive decisionmaking to deny refunds to federal retirees who had paid the taxes invalidated by *Davis.*

This case raises the question, left open in *Harper,* of whether "federal law . . . necessarily entitle[s the retirees] to a refund." *Harper,* 113 S. Ct. at 2520. The majority of the 23 states that imposed *Davis*-type taxes have now refunded (or agreed to refund) those taxes to the federal retirees. Several states, however, are continuing their efforts to avoid their obligations to refund the taxes they unconstitutionally imposed on federal retirees. NARFE and its members in these remaining states are vitally interested in seeing that this litigation is finally put to rest and that refunds are finally paid. Moreover, because the issues raised in this petition affect the ability to recoup all types of unlawful taxes, NARFE and its members nationwide are interested in assuring that states cannot stack the deck against them and other taxpayers who seek refunds of erroneously or unlawfully collected taxes.

The Military Coalition is a voluntary association of 24 military-related organizations that was formed six years ago. Collectively, its constituent organizations represent the interests of almost two million members who are retired, reserve and active members of the Uniformed Services of the United States. The Military Coalition is dedicated to providing a cohesive means for the study and advocacy of issues impacting upon the maintenance of a strong national defense and the preservation of rights

and benefits its varied constituents have earned through years of dedicated service to the United States.

Resolution of the issues presented in this petition are of vital interest to the Military Coalition and the members of its constituent organizations. Not only do some of these members live in states where *Davis* litigation is ongoing, but all its members are interested in seeing a fair and evenhanded mechanism for challenging unconstitutional state taxation.

The designated federal retirees in Kansas, New York, Arizona, Virginia and Wisconsin are all class representatives of suits in their respective states seeking relief for the unconstitutional imposition of taxes on their federal pensions, or the failure to refund such taxes. While partial resolution of the *Davis* litigation has been announced or implemented in some of these states, nonetheless until all the remaining issues in these states are finally resolved, these class representatives will remain interested in all the legal issues arising out of the *Davis* litigation.

For these reasons, *amici* desire to have their voices heard in this case. This is not a case that simply involves one state or presents one isolated issue. The ramifications of the decision below are widespread and there are over two and a half million individuals who are interested in seeing that that decision is reviewed and reversed. Accordingly, pursuant to Rule 37.2, *amici* move for leave to file this brief in support of petitioners.

Respectfully submitted,

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QUESTION PRESENTED

Whether a state postdeprivation remedy that is neither "plain, speedy and efficient" nor "plain, adequate and complete" can be sufficient to satisfy the Fourteenth Amendment's requirement that states provide either a "clear and certain" predeprivation remedy or a "clear and certain" postdeprivation remedy designed to prevent the deprivation of property from becoming permanent.

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, THE MILITARY COALITION AND DESIGNATED FEDERAL RETIREES IN KANSAS, NEW YORK, ARIZONA, VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONER

The National Association of Retired Federal Employees ("NARFE"), the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin file this brief *amici curiae* in support of petitioner and urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Supreme Court of North Carolina.

INTEREST OF AMICI

Amici are NARFE, the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin. NARFE is a not for profit corporation that is dedicated to serving and protecting the interests of federal civil service retirees and the federal retirement systems. As more fully set out in the foregoing motion, NARFE and its members are vitally interested in the issue of taxpayers' entitlement to receive refunds of unconstitutional state taxation.

The Military Coalition is a voluntary association of 24 military-related organizations that was formed six years ago. *See* App. 1a-8a (providing a listing of its component organizations). Collectively, its constituent organizations represent the interests of almost two million members who are retired, reserve and active members of the Uniformed Services of the United States. As more fully stated in the preceding motion, the Military Coalition is dedicated to providing a cohesive means for the study and advocacy of issues impacting upon the maintenance of a strong national defense and the preservation of rights and benefits its varied constituents have earned through years of dedicated service to the United States. It and the members of its constituent organizations are affected directly by the decision below.

The designated federal retirees in Kansas, New York, Arizona, Virginia and Wisconsin are all class representatives of suits in their respective states seeking relief for the unconstitutional imposition of taxes on their federal pensions, or the failure to refund such taxes. *See* App. 8a-9a (listing individual class representatives). They, or litigants from their states, have previously appeared in this Court as parties seeking the same or similar relief.

STATEMENT

This case is but the latest in a long line of cases coming to this Court challenging a state's denial of refunds of taxes imposed on federal retirees in violation of 4 U.S.C. § 111. Since this Court decided *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court has seen 22 petitions from 15 states.[1] This Court has granted plenary review in three post-*Davis* cases[2] and it has yet to allow a state to refuse to refund taxes unconstitutionally imposed on federal retirees.

The states' war of attrition against federal retirees has been fought on several fronts. First and foremost, the states sought to rely on nonretroactive decisionmaking to deny refunds. While some state courts were unimpressed by these arguments,[3] the nonretroactivity defense was not

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[1] Arkansas—*Pledger v. Bosnick*, 113 S. Ct. 3034 (1993); Arizona—*Estate of Bohn v. Waddell*, 113 S. Ct. 3000 (1993); Colorado—*Kuhn v. Colorado*, 112 S. Ct. 1925 (1992); Georgia—*Reich v. Collins*, 113 S. Ct. 3025 (1993) and 114 S. Ct. 1048 (1994); Iowa—*McManus v. Iowa*, 112 S. Ct. 87 (1991); Kansas—*Barker v. Kansas*, 112 S. Ct. 1619 (1992); Massachusetts—*Filios v. Commissioner of Revenue*, U.S. No. 93-1145; Missouri—*Hackman v. Missouri Director of Revenue*, 493 U.S. 1019 (1990); Montana—*Sheehy v. Montana*, 113 S. Ct. 3025 (1993); New York—*Duffy v. Wetzler*, 113 S. Ct. 3027 (1993); Oregon—*Nutbrown v. Munn*, 112 S. Ct. 867 (1992); North Carolina—*Swanson v. Powers*, 112 S. Ct. 871 (1992) and *Swanson v. North Carolina*, 113 S. Ct. 3025 (1993); South Carolina—*Bass v. South Carolina*, 111 S. Ct. 2881 (1991) and 113 S. Ct. 3025 (1993); Virginia—*Harper v. Virginia Department of Taxation*, 111 S. Ct. 2883 (1991) and 113 S. Ct. 2510 (1993) and *Lewy v. Virginia Department of Taxation*, 111 S. Ct. 2883 (1991) and 113 S. Ct. 3024 (1993); Wisconsin—*Hogan v. Musolf*, 112 S. Ct. 867 (1992).

[2] *Barker v. Kansas*, 112 S. Ct. 1619 (1992); *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993); *Reich v. Collins*, U.S. No. 93-908.

[3] *E.g.*, *Hackman v. Director of Revenue*, 771 S.W.2d 77 (Mo. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Burns v. New Mexico*, No. SF 89-1314(c) (1st Jud. Dist. Santa Fe County Apr. 5, 1990).

finally laid to rest until this Court's decision last Term in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993). Several states also sought to distinguish between military and civil service retirees, contending that there were "significant differences" between military retirees and state government retirees justifying the discriminatory taxation. This effort was thwarted by this Court's decision in *Barker v. Kansas*, 112 S. Ct. 1619 (1992).

Having lost on nonretroactivity, and having lost in attempting to distinguish military retirement, states have fallen back on what appears to be the last line of defense: the putative availability of predeprivation remedies precludes postdeprivation relief. This is the issue that is before this Court in *Reich v. Collins*, No. 93-908, and pending in appellate courts in Virginia and New York.

Unlike *Reich*, and the Virginia and New York cases, the decision below does not rest on the putative availability of predeprivation relief. Following the lead of the Supreme Court of South Carolina, the court below held that retirees were barred from obtaining refunds because of their failure to follow a putative "pay under protest" postdeprivation remedy.[4]

While this case is distinct from *Reich* in that it involves postdeprivation rather than predeprivation remedies, this distinction is irrelevant for purposes of resolution of this

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[4] The Supreme Court of South Carolina held that South Carolina's refund statute, which provided a refund right to "*any taxpayer* [for] *any* license fee or tax," S.C.Stat. Ann. § 12-47-440 (emphasis added), did not apply to income taxes and that accordingly federal retirees were only entitled to refunds if they had paid their taxes under protest. *Bass v. South Carolina*, 414 S.E. 2d 110, 112 (S.C. 1992), *vacated*, 113 S. Ct. 3025 (1993). Since being remanded from this Court, the South Carolina litigation has been settled: all retirees who filed amended returns will receive full refunds plus interest in 1994; those who did not file amended returns will receive refunds in 1995 and 1996 without interest.

appeal. Indeed, this case and *Reich* are but two sides of the same coin: in *Reich* this Court must decide whether Georgia's putative predeprivation remedies are clear, certain, meaningful and adequate while here the question is whether North Carolina's postdeprivation statute satisfies these constitutional criteria. Thus, while resolution of *Reich* will almost certainly dispose of this case, nonetheless this case presents a comparable vehicle to resolve the issues of substantial importance before the Court in *Reich*.

REASONS FOR GRANTING THE PETITION

This case raises questions of substantial public importance concerning the propriety of states retaining taxes collected in violation of the Constitution and statutes of the United States. This case represents a variation of the recurring theme of the states denying federal rights by denying citizens a remedy for the states' violation of federal rights. Specifically, this case presents the interrelated questions of whether a state may change its postdeprivation remedial rules after the tax has been collected by creating a remedial scheme that is wholly illusory—one that results in the unlawful exaction remaining in the state treasury—where the state provides *no* predeprivation remedies to protect the federal right. Review by this Court is necessary to resolve finally the issue of whether this Court's decisions in *Harper, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), *Davis v. Michigan Dep't of Treasury*, and *Atchison, T. & S.F. R. Co. v. O'Connor*, 223 U.S. 280 (1912), may be subverted through the charade of state postdeprivation procedures which do not satisfy constitutional standards.

1. There has been and continues to be an unnecessarily large amount of litigation concerning taxpayer remedies in state courts. This is the *second* petition in this case and the thirteenth to be filed within the last two Terms challenging a state's refusal to refund taxes col-

lected in violation of the intergovernmental tax immunity doctrine.[5] Several of the petitions decided last Term involved the question of whether this Court's decision in *Davis v. Michigan* may be applied nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their retired pay. Now, in the wake of this Court's decision in *Harper* and its prior remand of this case, the issues presented by this petition—whether the states may deny relief under the guise of constitutionally deficient state remedies—is at the forefront of the states' continuing refusal to recognize this Court's decisions as the "controlling statement of federal law." *Harper*, 113 S. Ct. at 2515. The predeprivation variation of this issue—denying relief based on illusory predeprivation remedies—is pending before ths Court in *Reich*.[6] This case squarely presents the

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[5] *See Reich v. Collins*, No. 93-908, *cert. granted*, 114 S. Ct. 1048 (1994); *Pledger v. Bosnick*, No. 91-875, *cert. denied*, 113 S. Ct. 3034 (1993); *Barker v. Kansas*, No. 91-611, *rev'd*, 112 S. Ct. 1619 (1992); *Harper v. Virginia Dep't of Taxation*, No. 91-794, *rev'd*, 113 S. Ct. 2510 (1993); *Colorado v. Kuhn*, No. 91-980, *cert. dismissed*, 112 S. Ct. 1925 (1992); *Swanson v. North Carolina*, No. 91-1486, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Sheehy v. Montana Dep't of Revenue*, No. 91-1478, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Bass v. South Carolina*, No. 91-1697, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Norwest Bank Duluth, N.A. v. Minnesota Comm'r of Revenue*, No. 91-2047, *cert. granted and judgment vacated*, 113 S. Ct. 3026 (1993); *Duffy v. Wetzler*, No. 92-521, *cert. granted and judgment vacated*, 113 S. Ct. 3027 (1993); *Reich v. Collins*, No. 92-1276, *cert. granted and judgment vacated*, 113 S. Ct. 3028 (1993); and *Estate of Bohn v. Waddell*, No. 92-1748, *cert. denied*, 113 S. Ct. 3000 (1993).

[6] Identical issues are also pending in the *Davis*-related cases of *Harper, supra*, *Duffy, supra*, and *Gorum v. Commonwealth of Kentucky Revenue Cabinet*, 92-SC-1041-T, Kentucky Supreme Court. An analogous approach has also been successfully asserted by Georgia in *Beam* upon remand to nullify this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). *See James B. Beam Distilling Co. v. Georgia*, 263 Ga. 609, 437 S.E. 2d 782 (1993), *pet'n for cert. pending*, No. 93-1140.

other variation of this issue—denying postdeprivation relief by judicial legerdemain.[7]

While analytically different from the retroactivity issue resolved by this Court in *Harper*, this petition, like the *Reich* petition, presents the same ultimate question of whether states may render the enforcement of federal rights inutile by denying citizens a remedy for the states' violation of federal rights.

The court below held that petitioners were not entitled to relief because they failed to comply with North Carolina's "pay under protest" statute. This very statute, in the federal court version of this litigation, was found to be neither "plain, speedy and efficient" nor "plain, adequate and complete" so as to defeat federal court jurisdiction on Tax Injunction Act and comity grounds. Thus, the court below, over a vigorous dissent, has held that a state remedy insufficiently certain and adequate to preclude federal court jurisdiction is nonetheless sufficiently clear and adequate to meet the demands of Due Process. This anomaly contests the presumption of good faith upon which principles of comity and deference to state courts in state tax matters are predicated; more significantly, it raises serious doubts that the court below has correctly discerned petitioners' rights under the Fourteenth Amendment.

Until definitively ordered by this Court, state courts will continue to engage in a result-oriented search for reasons to deny relief to taxpayers, eschewing their duty to uphold and defend the Constitution of the United

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[7] In a recent shift of position, Wisconsin has switched its *Davis*-related theory of defense from the *Reich* predeprivation shell game to the *Swanson* postdeprivation game. *See* Petitioner's Opening Brief in the case of *Wisconsin Dep't of Revenue v. Hogan*, petition for review pending, 93-CV-2549, Circuit Court for Dane County (partial settlement pending).

States in favor of protecting their states' fiscs.[8] *See* Tatarowicz, *Harper v. Virginia Supports Retroactive Relief From Unconstitutional States Taxes*, 3 Journal of Multistate Taxation 244 (Jan.-Feb. 1994). Review by this Court is thus necessary to resolve this question of demonstrated difficulty and importance.

2. The decision of the North Carolina Supreme Court conflicts with the holdings of the Court in *Harper* and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of these landmark decisions.

As ably demonstrated in the dissent below, the North Carolina Supreme Court's conclusion that North Carolina's law satisfies due process cannot withstand scrutiny. Pet. at App. A, A-23-25. The decision below "upholds a sham procedure." *Id.* at A-25. The North Carolina Supreme Court simply adopted what "the home crowd wants" as the decision in this case. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 Pepperdine

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[8] In the wake of *Beam*, the states quickly realized that they could no longer rely on the prospectivity defense to defeat the enforcement of federal rights. *See, e.g., Robinson v. City of Seattle*, 119 Wash. 2d 84, 880 P.2d 818, 839-48, *cert. denied*, 113 S. Ct. 676 (1992) (following *Beam* and abolishing the rule of selective prospectivity originally announced in *National Can Corp. v. Washington Dep't of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, *cert. denied*, 486 U.S. 1040 (1988)). Indeed, upon the completition of briefing and oral argument before this Court in *Harper*, state taxing authorities conceded that it was unlikely that a prospectivity analysis of *Davis* was warranted. They also acknowledged that it was doubtful that *Davis* satisfied the threshold test for prospectivity. *See Harper Oral Argument Addresses Taxpayer Remedy*, TAX ADMINISTRATORS NEWS, December 1992 at 187. However, these state authorities were also quick to point out that hope was not lost because there was now a new game: "procedural bars" to remedies. *Id.* at 144. This was so even though such positions were "meritless." *See, e.g., Brumley v. Utah Tax Comm'n*, 868 P.2d 796 (Utah 1993); *Strelecki v. Oklahoma Tax Comm'n*, 872 P.2d 910 (Okla. 1993).

L. Rev. 227, 230 (1980). However, the decisions of the Court compel much more to satisfy the requirements of due process.

This Court's decision in *McKesson* required that North Carolina provide the petitioners with a postdeprivation procedure that satisfies the requirements of due process: "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40. As clearly established by the record below, the petitioners have been denied all "opportunity to contest the validity of the tax." *Id.*

Here, the clear and certain postdeprivation remedy provided by N.C.G.S. § 105.266.1 was repealed by administrative fiat after the taxes in issue had been collected. Pet. at 5. In its stead, the Attorney General of North Carolina purported to substitute a newly crafted demand rule, which was impossible for the petitioners to satisfy, particularly for tax years that were closed prior to the announcement of this rule. *Id.* In so doing, the State of North Carolina insured that the postdeprivation procedure afforded petitioners was anything but "meaningful;" indeed the procedure was intentionally designed to make "permanent [the] unlawful deprivation of property." *McKesson*, 496 U.S. at 40.

The holding of the court below approving this despotic act is directly contrary to the holdings of the Court in both *McKesson* and *Harper*.

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers like petitioners are remitted virtually exclusively to state courts to press their claims for refunds.[9] But it is state courts that have demonstrated the greatest difficulty in applying the

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[9] Indeed, here the court below compounded its error by refusing to recognize the preclusive effect of a federal court order. Pet. at 22.

Fourteenth Amendment. Review by this Court is thus necessary to assure a correct and evenhanded application of this Court's decisions to all federal retirees and, indeed, all state taxpayers. Absent review by this Court, "[t]he State too easily avoids its responsibilities and . . . go[es] its way unimpeded and unburdened with any remedy for those who have been wronged during the period of [North Carolina's] noncompliance with federal law." *Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J. dissenting).[10]

3. The result reached by the court below also discriminates based on the origin of the petitioners' claims. In North Carolina, taxpayers seeking to enforce rights secured under state law are assured a clear and certain judicial remedy to obtain refunds. N.C.G.S. § 105-266.1, Pet. at App. G, A-288. This clear and certain remedy is available whether the tax sought to be refunded has been paid with or without protest. *Id.*

A state remedial scheme that provides a clear and certain remedy for claims based on state law but denies that right to taxpayers seeking to enforce constitutional rights is unconstitutional. *See McKnett v. St. Louis & S.F. Ry.* Co., 292 U.S. 230, 234 (1934) ("A state may not discriminate against rights arising under federal law."). *See also Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (same).

4. In denying the petitioners refund relief for taxes collected in violation of the principles enunciated in *Davis*, the court below refused to give effect to the settled prac-

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[10] In stark contrast to the decision below, in those rare circumstances where federal courts have been able to exercise jurisdiction, there has been no difficulty in providing taxpayer relief for unconstitutional state taxes. *See, e.g., United States v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2888 (1991).

tice of the respondents.[11] As a result of the decision below, the Supreme Court of North Carolina cut off petitioners' existing remedy under the refund statute. This result conflicts with the decisions of this Court.

In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), this Court held that the state court violated Due Process by judicially depriving the taxpayer of all remedies for challenging the validity of a tax. Specifically, the Court held that a taxpayer has a property interest in a remedy procedure, and this property interest is protected by the Due Process Clause:

> Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id., 281 U.S. at 682 (footnote and citations omitted).

The petitioners are in precisely the same situation as the taxpayer in *Brinkerhoff-Faris*. At the time they pursued the refund remedy under N.C.G.S. § 105.266.1, it was settled that refunds were available in the situation at

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[11] "Settled state practice" evinces state law. As this Court explained in *Nashville, Charlotte & St. L. Ry. Co. v. Browning*, 310 U.S. 362, 369 (1940):

> It would be a narrow conception of jurisprudence to confine the notion of "law" to what is found written on the statute books, and to disregard the gloss which life has written upon it. *Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. . . .* Deeply embedded traditional ways of carrying out state policy . . . are often . . . truer law than the dead words of the written text.

(Emphasis added). *See, e.g.*, "North Carolina Income Tax Forms and Instructions," Pet. at App. L A-112 ("Your amended tax returns must be filed within three years from the date your original return was due, or within six months of the date the tax was paid, whichever date is later.").

issue in this case. *See e.g., "North Carolina Income Tax Forms and Instructions,"* Pet. at App. L A-112, 115, 119. Therefore, they had a property interest in the remedy—refunds pursuant to § 105.266.1—and the decision of the court below extinguishing that right at a time when petitioners have no other remedy available violated Due Process. *Brinkerhoff-Faris,* 281 U.S. at 682. For this reason as well the Court should grant the petition and reverse the decision below.

CONCLUSION

Taxpayers throughout the country remain unsure of what they must do so preserve their rights to relief from unconstitutional state taxation. As one prominent commentator recently observed:

> *Harper* answered only some of the questions taxpayers are asking in their attempts to secure refunds of unconstitutional taxes. A complete understanding of what is required is still several court decisions away, including the issue of appropriate remedies presented by *Harper* itself.

Tatarowicz, *Harper v. Virginia Supports Retroactive Relief From Unconstitutional State Taxes,* 3 Journal of Multistate Taxation 244, 247 (Jan.-Feb. 1994). Absent definitive guidance from this Court proclaiming that the time for toleration of the states' chameleon-like tactics has come to an end, no citizen will be able to enforce his or her right to relief from unconstitutional state taxation.

Amici submit that a complete understanding of what is required can only be reached by decisive resolution of the issues presented herein. Absent such review the states will continue their efforts to annul the judgments of this Court. If these efforts go unchecked, "the constitution itself [will] become[] a solemn mockery." *Cooper v. Aaron,* 358 U.S. 1, 18 (1958) (citation omitted).

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of North Carolina should be granted and its decision reversed.

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